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No. 721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

CARSON J. MAY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where an employee of a railroad, together with another employee, left a tool house to gather coal along the tracks adjacent to the tool house, and where the coal was to be collected in a washtub and used to fuel a stove in the tool house, and where the employee was not under orders to gather a certain amount of coal or to gather coal in a certain period of time, and where the employee, having gathered some coal, returned to the tool house and carried the washtub through the doorway in which a motor car was situated and where the employee alleged injuries as a result of having to lift the washtub up and to the side in order to carry it past the motor car, were the trial court and the

Court of Appeals correct in holding that there was no evidence of negligence on the part of the railroad under the Federal Employer Liability Act, Title 45 U.S.C.A. Sec. 51, which caused the alleged injuries?

STATEMENT OF THE CASE

The facts of this case appear in the Statement of the Case set forth in the brief of petitioner. Respondent only wishes to add that it is clear that petitioner volunteered and was not directed to gather the coal. (R. 77). Furthermore, petitioner had at other times gathered coal and used the same washtub. (R. 114). The coal carried on previous occasions varied as to amount. (R. 121). The petitioner was under no pressure to hurry up the process of gathering the coal (R. 128), and no request for assistance was made. (R. 122). The other members of the track crew were in the tool house as petitioner was carrying the coal through the doorway (R. 122, 127).

ARGUMENT

I. There was no evidence of negligence under 45 U.S.C., Section 51.

At the outset it should be stated that there were two legal issues involved in this case in the trial court. The first issue was that of the sufficiency of evidence of negligence on the part of respondent. The second issue was whether or not the alleged injuries were caused solely by the negligence of petitioner himself. Both of these issues were pursued in the trial court and they would appear again in any re-trial of the case. The trial court, in sustaining respondent's motion for a directed verdict, did so solely on the basis that there was no evidence of negligence on behalf of respondent. The petitioner attempts to show that the trial court interjected contributory negligence and assumption of risk into the decision. The respondent submits that it is perfectly clear, indeed the trial court made it so, that the decision was based on the failure of petitioner to show negligence on the part of respondent. Thus, even though it is apparent that the alleged injuries were caused solely by negligence of petitioner, the issue before this Court is whether or not there was sufficient evidence of negligence of respondent so that the question should have been submitted to the jury.

This issue can be answered by a careful analysis of the concept of negligence and its application to the facts of this case. There should be no need to cite authorities for the definition of negligence as the lack of due care under the circumstances or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances. E.g., *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943). This action, or inaction, of the hypothetical reasonable man

is governed by what he anticipates to be the consequences of his action or inaction under the circumstances. It is the likelihood of a resulting injury that causes the reasonable man to act in a certain manner. E.g., *Schlemmer v. Buffalo R. & P.R. Co.*, 205 U. S. 1 (1907).

There is no authority that the above concept of negligence has been altered in any Federal Employers Liability Act cases. Indeed, there are many recent authorities in which this principle has been expressly set forth. In the case of *Inman v. Baltimore & O.R. Co.*, 361 U.S. 138 (1959), this court affirmed a judgment for defendant on the basis of insufficiency of evidence of negligence. The Court said at page 140:

> "The Court of Appeals of Ohio reversed, finding that 'there was a complete failure of proof to establish the negligence'. It said that it was not 'reasonably foreseeable' that petitioner 'would be injured by the action of a drunken driver, violating five traffic statutes . . .'"

It is interesting to note how the Court of Appeals of Summit County, Ohio, in deciding the *Inman* case, 108 O. App. 124, dealt with the often confused concepts of causation and negligence. The court found that the alleged injury was not reasonably foreseeable, and then said at page 131:

> "There was accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it."

The case of *Ringhiser v. Chesapeake & O.R.C.*, 354 U.S. 901 (1957) also makes clear that the prospect of the injury is an integral part of negligence. The Court in that case said at page 901:

> "In that circumstance there were probative facts from which the jury could find that respondent was or

> should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did."

In the case of *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521 (1957) this court acknowledged the concept of foreseeability of an injury as a part of negligence. In that case, an employee injured himself with a butcher knife which he used to cut ice cream when he discovered the ice cream was too hard to permit use of an ice cream scoop. The Court said at page 523:

> "On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him."

Therefore, it is established that there can be negligence only where an injury is reasonably foreseeable under the circumstances. This is the standard which measures the conduct of the reasonable man. In the instant case, the remarks of the lower courts in their review of the evidence were clearly referable as to what respondent should reasonably have foreseen or anticipated and, therefore, to the issue of negligence.

Before applying the facts of the instant case to the concept of negligence, the respondent wishes to clarify one common erroneous citation. It is often urged that the case of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) requires that the question of employer negligence be submitted to the jury. A careful reading of the *Rogers* case shows no variation in the traditional treatment of negligence. Indeed the commonly quoted Rogers rule concerns

itself not with negligence but rather with the issue of causation. The rule is found at page 506 as follows:

> "Under the statute the test of a jury case is simply whether the proofs justify *with reason* the conclusion that *employer negligence* played any part, even the slightest, in producing the injury or death for which damages are sought." (Emphasis added)

Thus, it is apparent that the *Rogers* case does not modify any of the standards previously established to test employer negligence, and the above rule presumes that there must still be evidence of negligence before applying its causation test. Indeed, the Court said at page 503:

> "There were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did."

The respondent submits that, in the instant case, the trial court was absolutely correct in finding no negligence for the reason that the evidence contains nothing to indicate that respondent had any reason to anticipate an injury to petitioner under the circumstances. There is no evidence in the record that coal had previously been carried through the doorway while the motor car was situated in the doorway, although it was uncontroverted that the motor car was frequently placed in such a position. The amount of coal to be gathered and the time in which the coal was procured were purely a matter of choice of the petitioner and his companion. There was no evidence that the washtub was inadequate for the purpose of carrying coal, nor any evidence that any one else had ever sustained such an injury.

In the case of *Wolfe v. Henwood*, (Cir. 8, 1947) 162 F. (2d) 998, the court found no negligence on behalf of the

employer. In that case the plaintiff had dipped fuel oil from a catch basin, and, after removing the oil from his clothes with gasoline-soaked rags, was burned while attempting to burn the rags. The court could find no negligence in the failure to provide a pump for removing the fuel oil, or in the failure to provide cleansing facilities. In noting that there were cleansing facilities several hundred feet away, the court stated that the plaintiff was acting on his own initiative when he burned the waste. The court said at page 1001:

> "It was not the method that was unsafe, *rather it was the time and manner of its use.*" (Emphasis added)

In the case of *McGivern v. Northern Pac. Ry. Co.*, (Cir. 8, 1942) 132 F. (2d) 213, an employee was injured when he slipped from a footboard that had accumulated snow and ice while the employee was working. The court affirmed a directed verdict for the defendant and held that the duty to provide a safe place to work does not extend to temporary conditions created by employees using or failing to use appliances furnished by the employer. The court observed that the employee could have cleaned the footboard if he thought it advisable. The court said at page 218:

> "The defendant could not anticipate that McGivern would not exercise proper care for his own safety and we can only conclude in view of his knowledge and experience, that he did not believe the footboard required cleaning."

The lack of negligence on the part of respondent is clearly shown in *Wadiak v. Illinois Cent. R. Co.*, (Cir. 7, 1953) 208 F. (2d) 925. In that case an employee was injured when he and a fellow employee lifted a barrel to a position on top of other barrels. Lifting equipment was available for the employees use. The court held that a directed verdict

should have been granted to defendant. In the course of its opinion the court observed that the employee made no attempt to seek help from the other workmen. The court said at pages 929 and 930:

> "Plaintiff's contention that defendant was negligent in failing to afford him a safe place to work was abandoned before the case went to the jury and is not now before us. Assuming, *arguendo*, however, that this question is presented, that is no evidence to the effect that the conditions in the car were inherently dangerous, or that any danger present was not readily apparent to a car repairman of reasonable prudence."

A case which bears marked similarity to the present case is *Louisville and N. R. Co. v. Green*, 255 Ala. 642, 53 So. (2d) (1951), in which an employee was injured while lifting mail bags onto a four-wheeled truck. The injury occurred as the employee was lifting the bag to the top of the pile, the top being about a foot above the employee's head. The court reversed a jury verdict for the plaintiff and took careful note that time was not a factor in loading and that no one told him how heavy the load should be, the employee being free to place as many bags as he wanted to on the truck. At page 648 the court said:

> "But it is equally true that appellee was not compelled under any phase of the evidence, to lift the sack of mail to the height which caused the injury.
>
> "The evidence indicates that the sack of mail which appellee was handling at the time of injury was heavier than the ordinary sack of mail. But be that as it may, *we do not think that appellant could have reasonably foreseen such an event, coupled with the further contingency that appellee would attempt to lift it to such a height as he did*, when a less hazardous method was available to him, in which method he was at liberty to choose." (Emphasis added)

Analysis of the cases in the light of the concept of negligence as set down by this Court clearly shows that the

respondent herein did not breach its duty of acting as a reasonable and prudent person under the circumstances. It should be emphasized here that, contrary to petitioner's assertion, it cannot be assumed that *Louisville and N. R. Co. v. Green*, *supra*, has been nullified by the Supreme Court decisions in the cases of *Dean v. Gulf, Colo. and S. F. Ry. Co.*, 353 U.S. 925 (1957) and *Thomson v. Texas and Pacific Ry. Co.*, 353 U.S. 926 (1957). Both *Dean* and *Thomson* were *per curiam* decisions, the effect of which were to affirm jury verdicts rendered in the trial courts. This means only that the Court felt the jury verdicts were justified on the facts of those cases, which were not identical to the *Green* case. The *Thomson* case concerned a woman mail handler who became injured in the course of her duties. She alleged failure to provide her with additional help. Although there was no evidence that she requested additional help, there was evidence that she had been told never to ask for such assistance. In the *Dean* case, an employee was injured as he and a fellow employee were attempting to tip over a heavy babbit pot. Although it was found that there was a failure to furnish the employee with proper tools, the lower court felt there was no negligence because there was additional manpower available. The lower court overlooked the evidence that on many prior occasions the babbit pot had been tipped by hand, and also the evidence that there was a hurry to get the particular job done on time. Thus, the *Green* case differs materially from the *Thomson* and *Dean* cases on its facts, and it should apply here with force.

Petitioner cites a few of the many F. E. L. A. cases in which the question of negligence was held for the jury. Although each F. E. L. A. case stands on its own facts, there are some common threads of fact patterns which prevail in

many of the cases and which provide a continuity to the decisions. They provide an insight as to why an injury is reasonably foreseeable under certain conditions. Two of the most common are prior identical conduct by employees which ultimately results in an injury to a particular employee and the performance of a duty by an employee (ultimately injured) under a given time limitation. In other words, if employees customarily acted in a certain way under certain conditions, the employer should anticipate subsequent acts under the same conditions. Similarly, although there is no such prior conduct, an employee who is given the impression that time is a factor in the performance of his duty, may be anticipated to act under the conditions then existing.

An excellent example of prior usage is *Wilkerson v. McCarthy, supra*. That case differs from the instant case in that defendant knew that employees were long accustomed to crossing a narrow, oil and grease-covered plank. The Court felt that defendant should have taken some precaution (there was no evidence presented that the chain around the pit had been put there to prevent access to the plank) because it could be anticipated that an employee might slip on such a plank. As to the prior usage, the Court said at pages 58 and 59:

> "Switchmen and other employees, just as pit workers continued to use the permanent board to walk across the pit after the chains were put up as they had used it before. Petitioner and another witness employed on work around the pit, testified positively that such practice continued."

In the case of *Ringhiser v. Chesapeake and O. R. Co., supra*, prior conduct was the important factor. That case involved an employee who was injured when a gondola

car, which he was using as a toilet, was jolted. In a *per curiam* decision, the Court said at page 901:

> "The trial judge set aside the jury verdict for petitioner, because, inter alia, it was held that the respondent 'had no duty to anticipate that a car was being used for such a purpose.' There was evidence, however, as the trial court found, *that to respondent's knowledge employees used gondola cars for the purpose*." (Emphasis added)

In many cases where there has been no prior conduct of employees, the factor of time in which the duty was to be performed was considered important. Petitioner urges that prior conduct is not a prerequisite of an F. E. L. A. case, but the very case he cites on page 11 of his brief, *Ferguson v. Moore-McCormack Lines*, *supra*, is an illustration where the factor of time was important. In discussing the employee's use of a butcher knife to scoop out ice cream, the Court said at page 523:

> "Finally, there was evidence that petitioner had been instructed to give the waiters prompt service."

It is pertinent here to repeat a quotation previously made herein from the *Ferguson* case to emphasize that the time factor was an important consideration in the holding of the Court. At page 523 it was held:

> "On this record, fair minded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task *with dispatch*, since no adequate equipment was furnished him." (Emphasis added)

In the case of *Davis v. Virginian R. Co.*, 361 U.S. 354 (1960) an employee was injured while engaged in a spotting operation. The Court said at page 356:

> "We think it should have been left to the jury to decide whether the respondent's direction to complete

> the spotting operation within 30 minutes, plus the inexperience of the brakemen assigned to perform this 'hot job", might have precipitated petition's injury."

Of course, there are other crucial factors besides the situations of prior conduct or usage and time limitations. For example, there is the situation of an employer direction to an employee to perform a duty in an inherently dangerous place. *Rogers v. Missouri Pacific R. Co., supra; Lillie v. Thompson*, 332 U. S. 459 (1947), (see page 12 of petitioner's brief). The two common factors discussed above, however, are particularly important by their absence in the instant case.

It can not be more clear that, in order to prove negligence, there must be evidence which shows that an injury is reasonably foreseeable. The respondent submits that there was no such evidence in the instant case. There was no evidence to indicate that respondent should have anticipated such an injury as petitioner alleges. There was no evidence that coal had been so carried on prior occasions, and the evidence is clear that petitioner was under no pressure to complete the gathering of the coal in a given time. Furthermore, the cases indicate that there must be positive proof of employer negligence. The recent case of *New York, New Haven and Hartford R. Co. v. Heneghan*, 364 U.S. 441, 5 L. ed. (2d) 183 (1960) concerned an employee who claimed to have sustained injuries as a result of an emergency application of the brakes by the engineer of the train in an effort to avoid striking a person who was on the tracks for the apparent purpose of committing suicide. The trial judge allowed a jury verdict to stand only because he felt that the trend of decisions from the

Supreme Court of the United States dictated that such a case should go to the jury. The Court of Appeals affirmed. However, this Court, in its decision of November 21, 1960, stated that the proofs were insufficient to submit the case to the jury.

In *Inman v. Baltimore and O. R. Co., supra*, there was some evidence of the type this Court indicated was necessary to prove negligence. But this Court felt that the evidence available was "too slender a reed" upon which to say the decision of Ohio's Court was erroneous.

The respondent resolutely maintains that the trial court in the instant case was correct in its view of the evidence and in sustaining respondent's motion for a directed verdict. The trial court appropriately applied the rule set down in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), an F. E. L. A. case, where the Court said at pages 479 and 480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directing verdict . . . without submission to the jury . . . By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The Court of Appeals was likewise correct in affirming the decision of the trial court after once again reviewing the evidence.

It is apparent that the occasion for petitioner's injury is the same as that which confronted the court in *Louisville and N. R. Co. v. Greco, supra*, and was stated at page 648:

> "The situation here simply shows a regrettable incident for which appellant is not responsible, since its duty to appellee was fully discharged."

II. Petitioner Has Failed to State a Case For Writ of Certiorari.

It has already been pointed out that the decisions of the Courts below were decided in a way which was in accord with the applicable decisions of this Court. There was no federal question of substance decided which has not heretofore been decided by this Court. The sole issue of whether or not the facts of the instant case warrant submission of the question of negligence to a jury was thoroughly considered by the lower courts under the applicable decisions of this Court and decided in the negative.

The petitioner is asking this Court to once again assess the same evidence that has already been assessed by the trial court and the Court of Appeals.

It is submitted that the evidentiary issue here involved does not meet the test of Rule 19 of the Revised Rules of the Supreme Court of the United States which provides for the granting of a writ of certiorari "only where there are special and important reasons therefor." This Court is referred to the separate opinion of Mr. Justice Roberts in the case of *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1942), wherein it is stated at page 358:

> "It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered

to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government."

Clearly, there are no "special and important reasons" for a writ of certiorari where lower courts have properly considered and applied the well established law.

CONCLUSION

In conclusion, it is submitted that the only question presented to this Court for review is the evidentiary issue of whether or not there was such evidence that the question of negligence should have been submitted to the jury. The lower courts applied the law as set forth in the decisions of this Court and no conflict has been created thereby. Petitioner has, therefore, failed to state a sufficient cause to merit further consideration by this Court on writ of certiorari.

Wherefore, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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